(7)

No. 03-485

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Relying on the presumption that statutes do not have extraterritorial reach, the court of appeals held that respondent's arrest was not authorized by 21 U.S.C. 878, and was therefore tortious, because it *was* carried out in a foreign country. Applying the so-called "headquarters doctrine," the court then held that the tortious conduct was actionable under the Federal Tort Claims Act (FTCA) because it did *not* "aris[e] in a foreign country." 28 U.S.C. 2680(k). Both holdings cannot be correct.

Indeed, as the government demonstrated in its opening brief, both holdings are wrong. While the arrest did, in fact, occur abroad, the court of appeals' reliance on the presumption against extraterritoriality to find the authority to arrest absent was misplaced for a number of reasons, including that the relevant statute applies to all felonies, a number of which expressly cover extraterritorial conduct, and that the presumption does not apply to statutes that grant the Executive Branch authority to enforce the law, as *Maul* v. *United States*, 274 U.S. 501 (1927), makes clear. The court's application of the "headquarters doctrine" is equally misguided, and irreconcilable with the text of the FTCA, because,

among other things, every element of the alleged tort occurred in Mexico.

More broadly, the court below erred in limiting the Executive's authority to enforce the law extraterritorially at the same time it vastly expanded the role of Article III courts in applying the law abroad, despite the FTCA's foreign-country exception. The result cannot be squared with either the text of the relevant statutes or the Constitution's allocation of power over foreign relations.

I. THE DRUG ENFORCEMENT ADMINISTRATION'S ARREST OF RESPONDENT WAS AUTHORIZED

A. The Arrest Of Respondent Was Authorized By 21 U.S.C. 878

The Ninth Circuit held that the Drug Enforcement Administration (DEA) categorically lacks the authority under Section 878 to make an arrest abroad (Pet. App. 33a-50a), even when the foreign country consents (*id.* at 35a n.24). In its opening brief (at 17-40), the government demonstrated that that interpretation is erroneous, and respondent does not seek to defend the Ninth Circuit's categorical rule. Instead, he asks the Court to affirm on the ground that the statute does not authorize the DEA to make such arrests "without the consent of the host country." Resp. Br. 11. Accord *id.* at 9, 10, 27-28. That interpretation is equally erroneous. See U.S. Br. 38 n.7.

1. Section 878 does not require consent for an extraterritorial arrest

Respondent's interpretation of Section 878 has no basis in the text of the statute, and because it allows arrests abroad when the country consents, the interpretation cannot rely on the presumption against extraterritoriality. Instead, respondent relies (Br. 17-29) on the canon requiring statutes to be construed, when possible, so as not to violate international law (a principle of which, he says, is that non-consensual extraterritorial arrests are prohibited). See generally

Murray v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). That canon, however, cannot overcome the plain text of Section 878. In addition, the canon does not apply to a statute, like Section 878, that authorizes conduct by the branch of government most directly responsible for the conduct of foreign affairs and involves a core power of the Executive Branch. Respondent's interpretation is also mistaken because it would require courts to decide whether a country has consented to an arrest within its borders, a type of judgment for which they are ill-suited.

a. *Respondent's interpretation of Section 878 is not supported by the text of the statute*

Respondent's reliance on the *Charming Betsy* canon fails for the same basic reason the Ninth Circuit's reliance on the presumption against extraterritoriality fails. Section 878 authorizes, without any geographic, consent-based, or other limitation, arrests by the DEA for "any felony[] cognizable under the laws of the United States." 21 U.S.C. 878(a)(3)(B). As a textual matter, respondent's interpretation of Section 878 is even less plausible than the court of appeals'. Respondent reads into Section 878, not only a prohibition on extraterritorial arrests, but also a qualification to that prohibition. Thus, while the court of appeals reads Section 878 as if it authorized arrests for "any felony cognizable under the laws of the United States, except in a foreign country," respondent reads it as if it authorized arrests for "any felony cognizable under the laws of the United States, except in a foreign country, unless the foreign country consents."

To borrow a sentence from respondent's brief (at 8), "Section 878 simply does not say this." It strains credulity to presume that, in granting the express authority to make arrests for any felony, Congress meant to include both an implied limit on extraterritorial arrests and an implied qualification if formal consent is granted. In the first place, statutes are not ordinarily construed so that the implied

provisions outnumber the express ones. Moreover, Congress was presumably aware that many felony statutes prohibit extraterritorial conduct, including conduct that directly threatens United States foreign policy. See, *e.g.*, 18 U.S.C. 1116(c) (attacks on diplomats); 18 U.S.C. 1119 (murder of U.S. national abroad); 50 U.S.C. 424 (extraterritorial jurisdiction over crimes related to release of national security information). The United States has a clear interest in punishing such conduct whether or not it can gain the express, rather than tacit, consent of a foreign nation.

b. The canon requiring statutes to be construed so as not to conflict with international law does not apply to Section 878

Respondent's reliance on the *Charming Betsy* canon is also misplaced because it does not apply to a statute like 21 U.S.C. 878, which is a broad authorizing statute that "carr[ies] into Execution" core Executive powers. U.S. Const. Art. I, § 8, Cl. 18. Section 878 authorizes officers and employees of the DEA to carry firearms, execute warrants, make warrantless arrests for any felony, seize property, and "perform such other law enforcement duties as the Attorney General may designate." 21 U.S.C. 878(a). In establishing the DEA and conferring upon it this broad investigative and arrest authority, Congress was well aware of the DEA's international mission and the Executive's preeminent role in dealing with foreign nations. Especially in this context, a statute that addresses the President's constitutionally assigned law enforcement functions should be interpreted, in the absence of an explicit limitation, to confer authority on the agency that is commensurate with the power of the Executive.

The Executive has the preeminent role in ensuring that its foreign law enforcement conduct complies with international law. That is particularly true in the context of the kind of customary international law invoked by respondent.

The extent to which customary international law norms should constrain the conduct of Executive functions is uniquely a question for the Executive. Indeed, the Executive's own custom and conduct helps determine the extent to which there is a sufficiently clear norm of international law. As a consequence, it is not reasonable to presume that, in enacting a broadly worded enforcement statute granting authority to the Executive, Congress implicitly incorporated a limit based on a particular view of a customary international law norm governing Executive conduct. Such a presumption is even less warranted when, as in this case, the principle of customary international law in question is ill-defined, has never been addressed by Congress, and implicates not only the Executive's law enforcement powers but also its power to conduct foreign affairs.[1]

The primary rationale for the presumption that statutes incorporate principles of customary international law is that Congress generally wishes to avoid "[t]he possibility of international discord." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). That is a legitimate concern with statutes that regulate private primary conduct, where private-party lawsuits can inject courts into sensitive foreign policy matters, but not with statutes that grant broad enforcement powers to the Executive

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[1] Respondent suggests that it is not merely customary international law that prohibits non-consensual extraterritorial arrests but an explicit agreement between the United States and Mexico. Br. 27-28 (citing Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, Feb. 23, 1989, U.S.-Mexico, T.I.A.S. No. 11,604, art. I(3) (Agreement)). But that agreement was not in force at the time of respondent's arrest. See Agreement art. V & n.1. In any event, all the agreement says is that it "does not empower" one party to enforce that party's laws in the territorial jurisdiction of the other party. *Id.* art. I(3). Not authorizing something is not the same as prohibiting it. Cf. *United States* v. *Alvarez-Machain*, 504 U.S. 655, 663-665 (1992) (concluding that failure of extradition treaty to authorize transborder arrests did not mean that the treaty prohibited them).

Branch. With a statute of the latter type, the Executive Branch—the Branch on which the Constitution confers authority to conduct foreign relations—can decide for itself whether a proposed action is likely to cause "international discord," and, if so, whether such foreign policy costs are outweighed by the law enforcement benefits. See *United States* v. *Corey*, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000) (noting that, in *Charming Betsy*, Court interpreted statute at issue in private dispute "so as to avoid embroiling the nation in a foreign policy dispute unforeseen by either the President or Congress," and that "[t]hese concerns are obviously much less serious where the interpretation arguably violating international law is urged upon us by the Executive Branch"), cert. denied, 534 U.S. 887 (2001).[2]

None of the cases cited by respondent (Br. 25-28 & nn. 18-21) involves a statute broadly authorizing Executive conduct, like that at issue here. And respondent is mistaken in his contention that two of the decisions (Br. 27 n.19) applied the *Charming Betsy* canon to a statute involving "the Executive's investigatory powers." Br. 27. In one of those cases, *CFTC* v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984), the canon was applied to a statute granting courts jurisdiction to enforce certain subpoenas. In the other, *FTC* v. *Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), it was applied to a statute granting subpoena power to an independent agency.[3]

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[2] Nor, as respondent contends (Br. 26), is application of the *Charming Betsy* doctrine necessary for reasons of separation of powers, so that courts do not cause unintentional violations of international law. In interpreting Section 878, courts do not mandate particular action but simply construe the general scope of the Executive's authority. It is the Executive that decides how to use its authority in particular circumstances.

[3] Respondent contends that, even if Section 878 authorizes non-consensual extraterritorial arrests, Congress "did not authorize low-level subcabinet officials to make the decision to engage in [such] acts [and thereby] violate international law." Br. 28. But there is no canon according to which statutes presumptively prohibit the violation of customary interna-

c. *Under respondent's interpretation of Section 878, courts would be required to make determinations that are beyond their competence*

Respondent's interpretation of Section 878 should also be rejected because it would place judges in the inappropriate position of making decisions about consent by foreign governments, an area where courts traditionally play no role. Such a counterintuitive congressional intent should not be inferred in the absence of clear textual direction.

As the government pointed out in its opening brief, the determination of whether a foreign country has consented to an arrest, either formally or informally, is a matter for "diplomatic resolution," not "judicial inquiry." Br. 38 n.7. That is particularly true because countries sometimes cooperate with the United States in making an extraterritorial arrest but, for reasons of domestic or international politics, cannot acknowledge that fact publicly. See *id.* at 38. Respondent suggests no standard by which, in a case of that type, a court could determine whether the requisite consent was given.

Nor does he provide answers to the questions posed by Judge O'Scannlain in his dissent. See Pet. App. 100a. What if, for example, there was doubt at the time of the arrest about whether there was a legitimate government from whom consent could be sought, or if there were "multiple contenders"? *Ibid.* How should a court go about determining whether a government is legitimate, or determining which contending government's consent counts? And what if no legitimate government is in place? Respondent suggests that consent must be given by "duly authorized officials," Br.

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tional law unless authorized by an Executive Branch official of a sufficiently high (though unspecified) rank. Moreover, as noted in the government's opening brief (at 40 n.9), Congress knows how to specify a requirement of personal authorization by designated high-ranking officials, and absent such a specification, courts are ill-equipped to decide which Executive Branch officials have a sufficiently high rank.

18 (quoting 1 Restatement (Third) of Foreign Relations Law of the United States § 432(2) (1987)), but he proposes no standard, much less a judicially manageable one, for determining whether consent has been obtained from the appropriate person. In the end, respondent has no answer to Judge O'Scannlain's observation that courts are "quite unsuited to undertake such analyses," and that doing so would bring them "perilously close to trenching on the power of diplomatic recognition that Article II, Section 3 places at the core of the Executive's foreign affairs authority." Pet. App. 100a-101a.[4]

2. The presumption against extraterritoriality does not apply to Section 878

In adopting a categorical rule that Section 878 does not authorize *any* transnational arrests (see Pet. App. 35a n.24), the court of appeals relied heavily on the presumption against the extraterritorial application of statutes (*id.* at 35a-50a). Although respondent seeks to draw support from this presumption (Br. 29-35), under his interpretation of the statute Section 878 does authorize transnational arrests (when the foreign country consents) and thus does apply extraterritorially in those circumstances. His reliance on the presumption is to that extent self-defeating.

But even if the presumption against extraterritoriality were consistent with respondent's position, it would not provide him any assistance, because the presumption does not apply to Section 878 and would be satisfied even if it were applicable. See U.S. Br. 27-40. In the first place, the statute

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[4] Moreover, even the court below concluded that there was no general international law prohibition on transborder arrests. See Pet. App. 21a-27a. In addition, regardless of whether a foreign country gave its consent, an extraterritorial arrest would not violate international law if, for example, the arrest was authorized by the United Nations Security Council, was undertaken in self-defense, or occurred in disputed territory. Federal courts are equally unsuited for deciding whether an arrest in a foreign country was justified on one of those grounds. See U.S. Br. 38 n.7.

by its plain terms grants arrest authority for "any felony." In light of the numerous criminal statutes that apply abroad, and the possibility that criminals will flee abroad, the plain terms of the statute authorize arrests abroad. Moreover, the specific limitations on extraterritorial arrests imposed by the Mansfield Amendment reinforce the conclusion that Section 878 involves a broad grant of arrest authority for any felony, including a felony committed abroad. See p. 15, *infra*. Respondent's arguments to the contrary are without merit.

a. *The presumption is not applicable to statutes that grant the Executive Branch authority to enforce the law*

As the government noted in its opening brief (at 29), this Court held in *United States* v. *Bowman*, 260 U.S. 94 (1922), that the presumption against extraterritoriality does not apply to statutes criminalizing conduct that, by its nature, can occur outside the United States. And the government showed (Br. 29-31) that the court of appeals' reliance on the presumption to limit the Executive's enforcement authority was inconsistent with this Court's decision in *Maul* v. *United States*, 274 U.S. 501 (1927), which applied *Bowman* in construing an ambiguous statute to permit the extraterritorial seizure of a ship in order to enforce the revenue laws. Respondent's efforts to distinguish *Maul* (Br. 31-32) are unavailing.

First, respondent says that *Maul* "never mentions the presumption against extraterritoriality." Br. 31. But that is precisely the point. Maul relies on *Bowman*, which found the presumption inapplicable.

Second, respondent points out that *Maul* "involved U.S. citizens and a U.S. boat." Br. 31. That is true but irrelevant. This Court's holding there did not depend on the fact that the case involved suspects who were citizens of the United States, and the Ninth Circuit's holding here did not depend on the fact that the case involves a citizen as the victim and a

suspect who is a citizen of a foreign country. The issue is whether 21 U.S.C. 878 authorizes the DEA to make arrests abroad, and neither the court of appeals' nor respondent's interpretation of that statute depends on the citizenship of the arrestee.

Third, respondent argues that, because the statute at issue in *Maul* allowed the Coast Guard to seize vessels "as well without as within their respective districts," it "explicitly authorized extraterritorial seizures." Br. 31 (quoting Act of Mar. 2, 1799, ch. 22, § 70, 1 Stat. 678). That contention simply denies the entire premise of the *Maul* decision. The Court found the statutory language ambiguous with respect to the question of extraterritoriality (because the language could be read to authorize seizures only domestically, but to allow seizures both within a seizing vessel's particular district and in other domestic districts), and it resolved the ambiguity by applying *Bowman*. 274 U.S. at 510-511.

Fourth, respondent contends that *Maul* is distinguishable because it "involved the *military* (*i.e.*, the Coast Guard), and thus implicated the Commander-in-Chief power in a manner not implicated in this case." Br. 32. But that was not part of the rationale for the Court's holding. Nor could it have been, since *Maul* did not in any meaningful sense involve the military. Under the Act that created it, the Coast Guard operated "under the Treasury Department in time of peace" and "as a part of the Navy * * * in time of war." Act of Jan. 28, 1915, ch. 20, § 1, 38 Stat. 800-801. In *Maul*, the Coast Guard was acting in the former capacity—it was enforcing the revenue laws—and thus was not differently situated from the DEA here.

b. *Applying the presumption would undermine its purposes*

Just as applying the *Charming Betsy* canon to limit Executive action makes little sense, applying the presumption against extraterritoriality to a statute like Section 878 does not advance the purposes underlying the presumption. Applying the presumption to a statute that regulates private primary conduct ensures that courts do not become involved in sensitive international matters for which the political branches have primary responsibility. As the government noted in its opening brief (at 35-40), these same considerations weigh *against* application of the presumption to a statute, like 21 U.S.C. 878, that grants the Executive Branch the authority to enforce the law, because the Executive has the constitutional responsibility for the conduct of foreign affairs and can make a judgment about whether extraterritorial application of the statute in a particular case will further the Nation's foreign policy interests.

Respondent has little to say in response to this point, except for a conclusory assertion that the court of appeals' reliance on the presumption does not "limit executive power over foreign affairs." Br. 34. But that is manifestly untrue. Arresting a suspect in a foreign country and dealing with the consequences of that action are both exercises of the Executive's power over foreign affairs. In a case in which a criminal "is hiding in a country * * * where the government, such as it is, is powerless to aid in his removal, or * * * where the Government is unwilling," 131 Cong. Rec. 18,870 (1985) (statement of Sen. Specter), respondent and the court below would leave the Executive Branch with only two options: allow the criminal to go unprosecuted or use the military to capture him. Since a central purpose of the presumption against extraterritoriality is to prevent interference with the Executive's conduct of foreign affairs, an application of the presumption

that would tie the Executive's hands in this way would undermine the purposes underlying the presumption.[5]

B. The Arrest Of Respondent Was Not Prohibited By The Mansfield Amendment, Which In Fact Confirms That It Was Authorized By Section 878

In its opening brief (at 23-27), the government demonstrated that the Mansfield Amendment, 22 U.S.C. 2291, which prohibits arrests in foreign countries under specified circumstances, would have been unnecessary if, as the Ninth Circuit held, 21 U.S.C. 878 prohibited such arrests under all circumstances. Respondent does not merely deny that the Mansfield Amendment shows that Section 878 authorized his arrest; he takes the position for the first time that the Amendment itself prohibited his arrest. Br. 11-17. Respondent is mistaken on both counts.

1. The Mansfield Amendment did not prohibit respondent's arrest

At the time of respondent's arrest, Section 2291(c)(1) provided, as it does today, that "[n]o officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." 22 U.S.C. 2291(c)(1) (Supp. I 1989). In its opening brief (at 23-24 & n.3), the government identified three separate reasons why this provision did not prohibit the arrest of respondent: the arrest was not

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[5] Respondent relies (Br. 30) on *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), where this Court applied the presumption against extraterritoriality in holding that a statute prohibiting the return of an alien to his country may not be invoked by an alien intercepted at sea. But *Sale* is not like this case, because the statute at issue there *restricted* the power of the Executive, and the application of the presumption thus furthered, rather than hindered, its ability to conduct international relations. See *id.* at 188 ("Th[e] presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.").

"directly effect[ed]" by officials of the United States; it was not part of a "foreign police action"; and it was not effected in connection with "narcotics control efforts." Respondent's contention that Section 2291(c) nonetheless prohibited his arrest (Br. 11-16) is without merit.

Respondent first argues that the DEA "directly effect[ed]" his arrest because it "initiated and supervised the entire operation." Br. 13. But a "direct[]" arrest is one in which there is no "intervening agency, instrumentality, or influence." *Webster's Third New International Dictionary* 640 (1986). Because respondent's arrest was carried out by just such an intervening means—Mexican nationals who were not DEA agents—the arrest was effected indirectly rather than directly.

Relying on a statement in a Senate Report, respondent next argues that a "foreign police action" includes a police action in a foreign country by United States officials. Br. 11-12 (quoting S. Rep. No. 605, 94th Cong., 2d Sess. 55 (1976)). Accord *id.* at 13. But that piece of legislative history does not relate to the meaning of the term "foreign police action." The Senate Report was for a bill that would have prohibited United States officials from "engaging in *any police action* in any foreign country with respect to narcotics control efforts," S. Rep. No. 605, *supra*, at 54 (emphasis added), and the portion of the report on which respondent relies addressed the meaning of the term "police action," *id.* at 55. While the phrase "any police action" certainly could be read to include an American police action abroad, that broad prohibition did not become law. See 22 U.S.C. 2291(c)(1) (1976). Rather, the version of Section 2291(c)(1) in effect at the time of respondent's arrest, which has not changed since, prohibited only arrests that were, *inter alia*, part of a "foreign police action," 22 U.S.C. 2291(c)(1) (Supp. I 1989). None of the legislative history cited by respondent (Br. 11-12 &

n.7) addresses the meaning of that phrase.[6] And the text and context of the term demonstrate that a "foreign police action" means a police action by the police of a foreign country. See U.S. Br. 24 n.3.[7]

Finally, while respondent contends that his arrest was "directly effect[ed]" by the DEA and was part of a "foreign police action," he never contends that it was effected in connection with "narcotics control efforts." Nor could he, since the arrest was not on narcotics charges, but on charges of racketeering, kidnapping, and murder. See *United States* v. *Alvarez-Machain*, 504 U.S. at 657 n.1. Whatever the scope of Section 2291(c)(1)'s prohibition of extraterritorial arrests, it does not encompass the arrest of someone charged with the murder of a United States government official.

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[6] Nor does the Office of Legal Counsel opinion on which respondent relies (Br. 12) support his contention that his arrest was part of a "foreign police action." That opinion addressed the question whether the Mansfield Amendment applies to "the use of United States military officers and equipment to assist foreign governments in *their* drug enforcement activities." *Application of the Mansfield Amendment to the Use of United States Military Personnel and Equipment to Assist Foreign Governments in Drug Enforcement Activities*, 10 Op. Off. Legal Counsel 122, 122 (1986) (emphasis added). In any event, the version of Section 2291(c) then in effect did not include the phrase "foreign police action." See *ibid.*

[7] Respondent's alternative argument that his arrest satisfies even this definition, because "the enterprise was a joint effort between the DEA and the Mexican nationals it hired to * * * [arrest] a person indicted for a criminal offense," Br. 13, overlooks the fact that the arrest was not carried out by Mexican police. That is not a technicality. Indeed, the premise of respondent's theory that the arrest was false and therefore tortious and actionable under the FTCA (and arbitrary and therefore an actionable violation of the law of nations under 28 U.S.C. 1350) is that the arrest was not made by the Mexican police, who indisputably have arrest authority in Mexico.

2. The Mansfield Amendment confirms that respondent's arrest was authorized by Section 878

Far from precluding the arrest here, the Mansfield Amendment confirms that the arrest was authorized by Section 878. Respondent denies that interpreting Section 878 not to authorize extraterritorial arrests would render the Mansfield Amendment's limitations meaningless, because the Amendment covers agencies besides the DEA. Br. 16. But the argument that an Amendment designed to preclude certain arrests "with respect to narcotics control" was not directed to the agency specifically charged with narcotics control is not sustainable.

First, the legislative history of the Mansfield Amendment confirms that the DEA was the agency that Congress principally had in mind when it passed the Amendment.[8] Second, if Section 878 does not provide the DEA with authority to make extraterritorial arrests, it is not clear how any federal agent had the authority to make extraterritorial arrests subject to the limits and exceptions of the Mansfield Amendment. The statutory provision that authorizes arrests by the Federal Bureau of Investigation (18 U.S.C. 3052), like the provision that authorizes DEA arrests (21 U.S.C. 878), does not explicitly authorize arrests in foreign countries. Respondent's argument about Section 878 thus leaves the Mansfield Amendment as a limitation in search of an extraterritorial arrest authority to limit. This Court can avoid that anomaly by reading Section 878, consistent with its plain terms, to authorize arrests for any felony, including one committed abroad.

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[8] See, *e.g.*, S. Rep. No. 605, *supra*, at 55 (Committee's intent is that DEA insure that agents abroad not take actions that might embroil United States in internal affairs of other countries); 122 Cong. Rec. 2591 (1976) (statement of Sen. Percy) (explaining what DEA may and may not do under Amendment); *id.* at 2593 (statement of Sen. Mansfield) (Amendment would provide DEA with guidelines for conduct abroad).

C. The Arrest Of Respondent Was Also Authorized Because It Was A Permissible Citizen's Arrest

In its opening brief (at 41-42), the government demonstrated that, even if the arrest of respondent was not authorized by 21 U.S.C. 878, it would not be tortious under the California law that governs citizen's arrests. Because the government is only liable under the FTCA "to the same extent as a private individual under like circumstances" (28 U.S.C. 2674), and because respondent's arrest would have been permissible under California law if it had been carried out by a private individual, the government is not liable under the FTCA. See U.S. Br. 41-42. Respondent does not deny that the arrest would have been authorized if it had been carried out by a private person. Instead, he treats that fact as irrelevant, because "a federal law enforcement agent does not act 'under like circumstances' to a private citizen." Resp. Br. 39. But no such categorical rule exists. To the contrary, when a federal officer acts outside the territorial scope of his special authority, he is just like an ordinary citizen, and is not subject to liability under circumstances that would constitute a valid citizen's arrest, as the very authority on which respondent relies (*ibid.*) shows.

Respondent, like the court below, relies on *Arnsberg* v. *United States*, 757 F.2d 971 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986). *Arnsberg*, for its part, followed the Second Circuit's decision in *Caban* v. *United States*, 728 F.2d 68 (1984). See *Arnsberg*, 757 F.2d at 978-979. Neither case helps respondent.

Both *Caban* and *Arnsberg* recognize that, in situations where a citizen is *not* authorized to arrest or detain an individual, courts cannot automatically impose liability on federal officers under the "like circumstances" test without considering the special authority granted to the federal officers. If the rule were otherwise, then every federal prison warden would face liability because he wields authority to

detain prisoners unlike any authority enjoyed by private citizens. For that reason, *Caban* refused to hold INS agents liable for a border detention even assuming private citizens had no comparable power to detain, 728 F.2d at 74-75, and *Arnsberg* refused to hold federal agents liable for arresting an individual on a material witness warrant even though private citizens had no authority to arrest in the absence of a crime, 757 F.3d at 978-979. But those decisions refusing to hold federal officers liable in circumstances where citizens lack authority to arrest provide no basis for holding federal officers liable in circumstances where a citizen *would* have the requisite authority.

Indeed, the Ninth Circuit's and respondent's reading of *Caban* and *Arnsberg* turns those precedents on their heads. When a law enforcement officer acts beyond the territorial limits of his special authority, he is in "like circumstances" to a private citizen, who likewise enjoys no special authority to arrest. California law recognizes this well-established principle, see U.S. Br. 41 & n.10, and there is no question that it would authorize a citizen to arrest respondent. In the same way that federal law authorizes a DEA agent to make a warrantless arrest if he has probable cause to believe that a felony has been committed, see 21 U.S.C. 878(a)(3)(B), California law authorizes a "private person" to "arrest another" when "a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it," Cal. Penal Code § 837(3). The very existence of this statute, whose language is virtually identical to Section 878, refutes respondent's contention that there is "no analogy" (Br. 40) between an arrest by a DEA agent and an arrest by a private individual. In circumstances like these, when any citizen could validly arrest respondent, federal officers are not uniquely without authority to arrest.

Finally, respondent's contention that federal law enforcement officers inherently are in "unlike circumstances" from a private citizen is not only deeply flawed but self-destructive.

As the Second Circuit correctly recognized in *Caban*, the consequence of there being no analogy between government and private authority is not a rule of automatic government liability, but the absence of a waiver of sovereign immunity. See 728 F.2d at 74.[9]

II. THE FEDERAL TORT CLAIMS ACT EXCEPTION FOR CLAIMS ARISING IN A FOREIGN COUNTRY BARS RESPONDENT'S LAWSUIT

The court of appeals held that respondent's false-arrest claim arose in California, and thus falls outside the FTCA's exception for claims arising in a foreign country, even though every element of the allegedly tortious conduct occurred in Mexico, damages accrued only while the conduct continued in Mexico, and the only reason the conduct was found to be tortious was that it occurred in Mexico. In its opening brief (at 43-50), the government demonstrated the erroneousness of that holding. Respondent urges the Court to affirm on the ground that "an FTCA suit does not arise in a foreign country and is thus not barred where it alleges that conduct *within the United States* caused harmful extraterritorial effect." Br. 36. That principle, however, has no basis in the text of the FTCA, which excludes from its coverage "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). The FTCA requires the tortious conduct to take place in the United States, and the fact that conduct in this country

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[9] Respondent contends that "[p]ermitting law enforcement to use 'citizen's arrests' to escape restrictions on their authority may also violate the Fourth Amendment." Br. 40. But treating the arrest of respondent as a citizen's arrest would not enable the DEA to escape any restrictions imposed by the Fourth Amendment. The DEA agents would remain government actors subject to the Fourth Amendment when and where it applies. In any event, the California law that authorizes an arrest of the kind that occurred here requires that the "private person" effecting the arrest have "reasonable cause" to believe that the arrestee committed a felony, Cal. Penal Code § 837(3), and the indictment returned by the grand jury established that there was probable cause to believe that respondent had done so.

"caused" harmful extraterritorial effects does not mean that the domestic conduct is itself tortious. Indeed, respondent's view of where conduct arises would undermine the premise of the Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply abroad), because the searches there were arranged by DEA agents in California. See *id.* at 262.

Respondent relies on the fact that "the decision of United States governmental officials * * * to arrest" him was made in the United States, and that the DEA "planned and ordered the execution of th[e] operation" here. Br. 38. He contends that these actions were "torts committed in [California] that have extraterritorial effect." Br. 36. But the cause of action in question is not conspiracy, which in any event "is not a tort in the State of California." *Petherbridge* v. *Altadena Fed. Sav. & Loan Ass'n*, 112 Cal. Rptr. 144, 150 n.3 (Ct. App. 1974). The cause of action is false arrest, and every element of that tort occurred in Mexico. It is therefore a "claim arising in a foreign country" that is excluded from the FTCA's waiver of sovereign immunity. 28 U.S.C. 2680(k).

Contrary to respondent's assertion (Br. 36), this result is entirely consistent with *Richards* v. *United States*, 369 U.S. 1 (1962), which holds that, under 28 U.S.C. 1346(b)(1), "the act or omission occurred" where the negligence took place, even if the injury occurred elsewhere. That holding is a straightforward application of the principle that the "act" in a negligence case is the negligence itself—the breach of a duty of care. See W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 31, at 169 (5th ed. 1984). For that reason, the cause of action for the negligent repair of an airplane in Oklahoma likely would arise in Oklahoma even if the plane crashed in Mexico. In an intentional-tort case, however, the "act" is the prohibited intentional act—in this case, the false arrest—and ordinarily occurs in the same place that the injury occurs. There is thus nothing "anoma-

lous" (Resp. Br. 38) about the fact that the government is liable when its agent commits an act of negligence in the United States that causes harm in a foreign country, but not when its agent commits an intentional tort in a foreign country that was planned in the United States. Only the latter situation involves a tort that "aris[es] in a foreign country." 28 U.S.C. 2680(k).

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For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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